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In The Supreme Court of The United States

OCTOBER TERM 1972

72-355

HARRIETT C. RUSSELL,
EXECUTRIX OF THE ESTATE OF
T. C. RUSSELL, Deceased

Petitioner

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner, Harriett C. Russell, Executrix of the Estate of T. C. Russell, Deceased, prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Tenth Circuit rendered in these proceedings on June 8, 1972.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit, as yet unreported, appears at Appendix A, infra, pp. A2 - A8. The opinion of the District Court is reported at 327 F.Supp. 32 and appears at Appendix B, infra, pp. B2 - B7.

JURISDICTION

The judgment of the Court of Appeals was entered on June 8, 1972 (Appendix A, infra, p. A2). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The United States brought suit to recover federal estate taxes due from the Estate of T. C. Russell, Deceased, against Harriett C. Russell as Executrix of the estate and as surviving joint tenant pursuant to 26 U.S.C. 6324(a) (2). The questions thereby presented are:

1. Whether assessment against the petitioner as surviving joint tenant is a prerequisite to suit under 26 U.S.C. 6324(a) (2).

2. Whether the procedural requirements of 26 U.S.C. 6901 are mandatory and exclusive or cumulative and alternative.

STATUTORY PROVISIONS INVOLVED

The statutory liability of a surviving joint tenant under 26 U.S.C. 6324(a)(2) reads in pertinent parts as follows:

> Liability of transferees and others.--
> If the estate tax imposed by chapter 11 is not paid when due, then the . . . surviving tenant, . . . to the extent of the value at the time of the decedent's death, of such property, shall be personally liable for such tax. Any part of such property transferred by (or transferred by a transferee of) such spouse, transferee, trustee, surviving tenant, person in possession, or beneficiary, to a purchaser or holder of a security interest shall be divested of the lien provided in paragraph (1) and a like lien shall then attach to all of the property of such spouse, transferee, trustee, surviving tenant, person in possession, or beneficiary, or transferee of any such person, except any part transferred to a purchaser or a holder of a security interest.

The procedural requirements of 26 U.S.C. 6901 read in pertinent parts as follows:

> §6901. Transferred assets.
>
> (a) Method of collection. -- The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, paid and collected in

the same manner and subject to the same provisions and limitations as in the case of the taxes with respect to which the liabilities were incurred:

(1) Income, estate and gift taxes. --

(A) Transferees. -- The liability, at law or in equity, of a transferee of property--

* * * * * *

(ii) of a decedent in the case of a tax imposed by chapter 11 (relating to estate taxes) * * *

* * * * * *

(c) Period of limitations. -- The period of limitations for assessment of any such liability of a transferee or a fiduciary shall be as follows:

(1) Initial transferee. -- In the case of the liability of an initial transferee, within 1 year after the expiration of the period of limitation for assessment against the transferor;

* * * * * *

(h) Definition of transferee. -- As used in this section, the term "transferee" includes . . . any person who, under section 6324(a) (2), is personally liable for any part of such tax.

The deficiency restrictions of 26 U.S.C. §6213 read in pertinent part as follows:

> . . . Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B or chapter 42 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. . . .

The definition of a taxpayer is set forth in 26 U.S.C. 7701(a) (14) as follows:

> (a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof--
>
> (14) Taxpayer-- The term "taxpayer" means any person subject to any internal revenue tax.

The procedural requirements of 26 U.S.C. 7404 read as follows:

> If the estate tax imposed by chapter 11 is not paid on or before the due date thereof, the Secretary or his delegate shall proceed to collect the tax under

> the provisions of general law; or appropriate proceedings in the name of the United States may be commenced in any court of the United States having jurisdiction to subject the property of the decedent to be sold under the judgment or decree of the court. From the proceeds of such sale the amount of the tax, together with the costs and expenses of every description to be allowed by the court, shall be first paid, and the balance shall be deposited according to the order of the court, to be paid under its direction to the person entitled thereto. This section insofar as it applies to the collection of a deficiency shall be subject to the provisions of sections 6213 and 6601.

STATEMENT OF THE CASE

The facts relevant to the question presented by this petition are uncontroverted and may be introduced to the Court as follows:

The Government brought this action pursuant to 28 U.S.C. §1340 and §1345 and §7401 of the Code to reduce to judgment the defendant's statutory liability as surviving tenant of jointly owned property under §6324(a)(2) for the unpaid federal estate taxes totalling more than $116,000.

This case was submitted to the District Court on stipulated facts. The appellee's husband, T. C. Russell,

died on January 12, 1960 and an estate tax return for his estate was filed August 30, 1961. On August 20, 1964, the Government mailed a notice of deficiency of estate taxes. The estate's tax liability was finally determined following proceedings in the Tax Court. The Government duly assessed the estate for the taxes so determined, after which the estate paid $35,000.00 of the total, leaving a balance due and owing of $116,165.00, plus the accrued interest.

Mrs. Russell is the surviving joint tenant of property that was included in her husband's gross estate for federal estate tax purposes worth at least $900,000. The Government brought this suit against Mrs. Russell to recover from her individually the unpaid taxes owed by her husband's estate, pursuant to Section 6324(a)(2). The Government relied solely on the appellee's alleged legal liability for the unpaid taxes as surviving tenant, under §6324(a)(2), and conceded that its claim "is not based upon the enforcement of a federal estate tax lien nor is it equitable in nature." While the Government properly assessed the estate, no assessment was made against the appellee individually.

Upon cross-motions for summary judgment in the District Court, the Court found for petitioner, Harriett C. Russell. (Appendix B.) The United States sought review in the Court of Appeals for the Tenth Circuit, and that Court reversed and remanded the case to the District Court. (Appendix A.) Petitioner applied for a stay of mandate in order to seek review of the matter by this Court, and the Court of Appeals for the Tenth Circuit ordered the mandate stayed pending disposition of this petition to be filed on or before September 5, 1972.

REASONS FOR GRANTING THE WRIT

The question presented is of importance in the administration of federal tax laws.

According to the United States Department of Commerce, for the fiscal year 1970, 132,000 estate tax returns and 148,000 gift tax returns were filed with the Internal Revenue Service. This was an increase over 1969, and the projected figure for 1971 is even higher. In the case of federal estate tax returns, each estate has at least one fiduciary and one beneficiary, and in the case of federal gift tax returns there is at least one donee. Thus, a substantial minimum of 412,000 persons each year are potentially subject to the application of Section 6901. Furthermore, more than $3,680,000,000 in tax liabilities was involved in those estate and gift tax returns for 1970. (Statistical Abstract of the United States, 1971, U. S. Dept. of Commerce.)

In addition, despite a ruling of this Court in 1932 which appears to be dispositive of the issue in dispute, taxpayers have continually litigated the issue. See, e.g., United States v. 58th St. Plaza Theatre, Inc., 287 F.Supp. 475 (S.D.N.Y. 1968); United States v. Goldsmith, 272 F.Supp. 924 (S.D.N.Y. 1967). It is petitioner's belief that the rationale for the continued non-acceptance of this Court's prior ruling is that the prior ruling is directly and inescapably contrary to the express mandate of Congress in enacting the provision in question. It is submitted that this Court, in making its earlier decision, was not adequately apprised by counsel of the pertinent legislative history. For this reason, petitioner believes that it is in the interest not only of the many taxpayers affected, but also of the Government, that

this Court reexamine its earlier position in light of a full and complete presentation of the pertinent legislative history.

This Court in Leighton v. United States, 289 U.S. 506 (1932), was faced with the specific question of whether the predecessor provision to Section 6901, namely Section 280 of the Revenue Act of 1926, was mandatory or cumulative. (Section 6901, when enacted in 1954, combined the predecessor provisions for transferees' income, estate and gift tax liabilities. No substantive change was made in the consolidation.) In ruling that the provision was merely cumulative, the court relied on its prior ruling in Phillips v. Commissioner, 283 U.S. 589 (1930), which case purported to have reviewed the legislative history of Section 280 of the Revenue Act of 1926. However, even a cursory examination of that legislative history indicates that both the Phillips and Leighton decisions are uncontrovertably in error. Following is a brief presentation of that legislative history.

The House Report accompanying the original enactment provides:

> Without in any way changing the extent of such liability of the transferee under existing law, the amendment enforces such liability (whether in respect of the tax as originally returned by the taxpayer or a deficiency therein) in the same manner as liability for a tax deficiency is enforced; that is, notice by the Commissioner to the transferee and opportunity either to pay and sue for refund or else to proceed before

> the Board of Tax Appeals, with review by the courts. Such a proceeding is in lieu of the present equitable proceeding and is exclusive, save that, of course, in a proper case, a tax lien upon the assets arising prior to their transfer may be enforced against the transferee by distraint, or in case of real estate by a proceeding in equity. (1)
>
> * * * * * *
>
> In view of the above situation, it will be seen that the amendment makes the procedure for the collection of the amount of the liability of transferees conform to the procedure for the collection of taxes. The amendment thereby substitutes the specialized and more expeditious procedure of the Board for that of the district courts in equity and will develop through the Board a uniformity of precedents in lieu of the present rather vague principles of law governing the liability of a transferee for unpaid taxes of a transferor. . . . (H. R. Rep. No. 356, 69th Cong., 1st Sess., pp. 44-45 (1926) (emphasis added).)

---

(1) The waiver by the United States that the action is not based upon an equitable claim or the enforcement of a tax lien (Appendix B, infra, p. B3) precludes assertion that this suit is within the exceptions to the rule of Section 280.

In looking at the legislation proposed by the next Congress, in 1928, it is irrefutable that the 1928 Congress believed it had made these procedures exclusive in 1926 and did not intend to change this consequence.

The House Committee on Ways and Means, in 1928, proposed to add Section 605 to the 1928 Revenue Act. As proposed, Section 605 would have made the procedures prescribed by Section 280 and 316 (predecessors of Section 6901) statutorily optional. Section 605 as proposed, read as follows:

> SEC. 605. ALTERNATIVE REMEDIES IN ENFORCING LIABILITY OF TRANSFEREES.
>
> Proceedings instituted after the enactment of this Act under Section 311 of this Act or under Section 280 or 316 of the Revenue Act of 1926 for the enforcement of the liability of a transferee or fiduciary, shall be in addition to and not in substitution for proceedings in Court, at law or in equity, for the enforcement of such liability; and the Commissioner may cause proceedings for the enforcement of such liability to be instituted either under such sections or in court, in his discretion. (H.R. 1, 70th Cong., 1st Sess., §605 (1928) (emphasis added).)

The House Committee in 1928, believing that the procedures it enacted in 1926 were exclusive, proposed Section 605 as a modification of Sections 280 and 316 to make the procedures elective or optional.

The Senate, in reviewing the House's proposal, rejected the proposed change and restated its intention to make the procedural provision the exclusive remedy for the Government in proceeding against a transferee for the collection of delinquent taxes. The explanation is found in the Senate and Conference Committee Reports:

> As heretofore explained, section 280 of the Revenue Act of 1926 prescribed a new procedure for the enforcement of the liability of the transferee of property of a taxpayer. This new procedure under the present law is exclusive. The House bill (section 605) provided that the Commissioner may at his option proceed under section 280 or by a proceeding in court. Inasmuch as section 280 has proved of greater effectiveness in preventing the evasion of taxes than the former method of court procedure, there would seem to be no occasion for the Commissioner to resort to the courts. Consequently, the committee recommends that the provision be eliminated. The committee believes that whatever doubts there may be as to the constitutionality of section 280 they are not of sufficient importance to require the restoration of the old procedure. (S. Rep. No. 960, 70th Cong., 1st Sess., p. 22 (1928) (emphasis added).)

The Report of the Conference Committee indicates that the House consented to the elimination of its proposal and Section 605 was not enacted into law. It should

be noted that no provision comparable to Section 605 has been proposed or enacted by Congress to this date.

The above-cited legislative comments establish, unequivocally, that Congress intended Section 6901 and its predecessor provisions to constitute the exclusive remedy by which the Government may assert transferee liability. Thus, in looking at congressional comments as an aid in interpreting the predecessor provisions of Section 6901, there can be no doubt of Congress' intent and rationale in making the procedure an exclusive one.

Only this Court's erroneous rulings in Leighton and Phillips have prevented Congress' accomplishment of its express purpose.

Nor does the fact that Congress has remained silent in the face of the Leighton decision lend credence to the Government's contention. In another tax case of similar circumstance, James v. United States, 366 U. S. 213 (1961), this Court did not hesitate to overrule its prior erroneous ruling in Commissioner v. Wilcox, 327 U.S. 404 (1946). Commenting on the effect of Congressional silence, the Court stated:

> But the fact that Congress has remained silent or has re-enacted a statute which we have construed, or that Congressional attempts to amend a rule announced by this Court have failed, does not necessarily debar us from re-examining and correcting the Court's own errors. 366 U.S. at 220.

It will be noted that in the James case not only was Congressional silence urged and rejected as implying

acquiescence, but Congress had even attempted to effect a statutory amendment to the Wilcox rule and such attempt had failed.

The ruling of the Court of Appeals was not based upon a rejection of the legislative history argument. That court felt bound by the earlier decision in Leighton, and deferred to this Court's prior resolution of the issue. However, it is submitted that the Court of Appeals tacitly admitted that there is merit to petitioner's argument regarding the legislative history when it stated:

> Secondly, it is urged that the language used in §6901 as well as the legislative history of §6901, clearly indicates that the collection provisions of §6901 were intended to be exclusive and mandatory. In this regard, it is argued that the Supreme Court in Leighton was not fully apprised by counsel in that case as to the legislative history of §6901 and that had that Court been more fully informed it would have ruled differently. Such argument should be made to the Supreme Court. . . . We are not at liberty to go behind the Leighton rule. Appendix A, infra, p. A8.

Accordingly, it is respectfully submitted the fundamental reason for granting the writ, apart from the vast number of persons affected by the issue, lies in the fact that the issue is a continuing source of litigation, due to the basic unreliability of this Court's earlier decision made without consideration of, and in direct conflict with, the express Congressional intent in enacting Section 6901.

However, even assuming that this Court would reaffirm its holding in Leighton that Section 6901 is cumulative and not mandatory, it is submitted that the Leighton decision is not controlling of the case at bar.

Leighton involved a suit in equity in the nature of restitution or for an accounting. In the instant case the Government has disclaimed any right to recover on equitable principles or upon a federal estate tax lien (Appendix B, infra, p. B3). This distinction was the basis for the decision of the District Court below:

> . . . In these circumstances, I believe that the government, having elected to proceed solely under §6324, may not disregard the procedural prerequisites which in my judgment must be satisfied when an action is brought under that section. Among these requirements is one that an assessment against the transferee be made and notice thereof sent to him. I base this conclusion on the specific reference in §6901(h) to a transferee as including one whose liability is predicated on §6324. 327 F. Supp. at 633.

The rationale is that even if Section 6901 is not mandatory in all cases, there being exceptions for equitable proceedings, United States v. Fisher, 57 F. Supp. 410 (E.D. Mich. 1944), enforcement of tax liens, United States v. Bess, 357 U.S. 51 (1958) and collections under state law, Commissioner v. Stern, 357 U.S. 39 (1958), where the Government proceeds in a direct suit solely under Section 6324(a) (2), then the procedures of Section 6901 must be followed.

This precise question is an issue of first impression, as the Court of Appeals noted in its opinion:

> Our attention has not been directed to any reported case concerned with the applicability, if any, of the assessment provisions of §6901 to an action in law to collect on the statutory liability of a surviving tenant created by §6324(a) (2). Appendix A, infra, p. A7.

It is further submitted that the liability imposed by Section 6324(a) (2) is a primary obligation and, as such, requires a notice of deficiency prior to institution of suit to collect.

Section 6324(a) (2) in part provides that if the estate tax imposed by Chapter 11 is not paid when due, "then the . . . surviving tenant . . . shall be personally liable for such tax . . ." (emphasis added). In Schuster v. Commissioner, 312 F. 2d 311 (9th Cir. 1962), the court held that the liability imposed under Section 6324(a) (2) is a primary obligation.

Since the surviving joint tenant under Section 6324(a) (2) becomes personally liable for the tax, such surviving joint tenant clearly falls within the definition of a taxpayer in Section 7701(a) (14), which provides that "the term taxpayer means any person subject to any internal revenue tax." Since a surviving tenant is therefore deemed to be a taxpayer, a proceeding against such surviving tenant is subject to the requirement of Section 6213, which provides in part that "No assessment of a deficiency in respect of any tax imposed by subtitle A or B or chapter 42 and no levy or proceeding

in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer. . . . " Since no deficiency notice was mailed to the surviving joint tenant as required by Section 6213, the United States is unable to proceed in court for the collection of such deficiency.

Finally, it is submitted that the Government's failure to comply with Section 6213 bars the present suit as one in contravention of the express mandate of Section 7404. Section 7404 essentially provides that if the estate tax is not paid when due, an action may be initiated to collect the tax under the provisions of general law or a proceeding may be commenced in the United States District Court to subject the property of the decedent to be sold under the judgment of that court. However, Section 7404 specifically requires that it be subject to the provisions of Section 6213, namely, that no action may be instituted under Section 7404 until the surviving tenant, as taxpayer, receives a notice of deficiency.

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals in the instant case raises a question of general importance in the administration of the laws which should be reviewed by this Court. Accordingly, it is respectfully submitted that this petition for a writ of certiorari be granted.

Respectfully submitted,

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HIGGS, FLETCHER & MACK

Counsel for Petitioner

APPENDIX A

[Following is set forth the opinion of the Court of Appeals for the Tenth Circuit in the matter of No. 71-1378, United States v. Harriett C. Russell, Executrix of the Estate of T. C. Russell, deceased, judgment entered June 8, 1972. Also included is that Court's stay of mandate ordered July 12, 1972.]

Before HILL, HOLLOWAY and McWILLIAMS, Circuit Judges

McWILLIAMS, Circuit Judge.

This is a tax case. Pursuant to the provisions of §6324(a) (2) of the Internal Revenue Code of 1954, the United States brought a civil action in debt against Harriett C. Russell, the surviving widow of the decedent, T. C. Russell, seeking a personal judgment against her for unpaid federal estate taxes in the amount of $116,165 which had previously been assessed against the estate of T. C. Russell.

At the date of his death T. C. Russell and his wife, Harriett, owned in joint tenancy property of a value of approximately $900,000. By reason of the joint tenancy this property did not pass through T. C. Russell's probate estate and accordingly was not available to his personal representative for payment of federal estate taxes, though it was included in the federal estate tax return.

Following proceedings in the Tax Court, the federal estate tax liability was ultimately determined to be $151,165, after which the estate paid the sum of $35,000, leaving a balance due and owing of $116,165. The foregoing facts were stipulated to by the parties in an amended pretrial order, and additionally it was agreed that though there had been an assessment against the estate of T. C. Russell, no assessment was ever made against Harriett Russell.

On this state of the record, i.e., complaint, answer, and amended pretrial order, both the United States and Harriett Russell moved for summary judgment. The latter motion was based on the grounds that there was no genuine issue as to any material fact and that "plaintiff's failure to make an assessment of tax liability against the defendant bars this action." The trial court granted Russell's motion for summary judgment and entered an order dismissing the action "on its merits." The United States now appeals the judgment dismissing its action.

The trial court dismissed the action on the grounds that having failed to make a timely assessment against Harriett Russell (within one year after the expiration of the period of limitation for assessment against the transferor), as required by § 6901 of the Internal Revenue Code of 1954, the United States was precluded from thereafter maintaining an action under § 6324(a) (2) against Harriett Russell as the surviving tenant of jointly owned property. We disagree and hold that the collection procedures contained in § 6901 are not exclusive and mandatory, but are cumulative and alternative to the other methods of tax collection recognized and used prior to the enactment of § 6901 and its statutory predecessors. In thus holding, we rely primarily on what we deem to be the teaching of Leighton v. United States, 289 U.S. 506 (1933).

Section 6324(a) (2), in its pertinent parts, provides that if an estate tax is not paid when due then the "surviving tenant * * * who receives * * * property included in the gross estate * * *, to the extent of the value, at the time of the decedent's death, of such property, shall be personally liable for such tax."

The pertinent provisions of § 6901 read as follows:

§ 6901. Transferred assets

(a) Method of collection.--The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, paid, and collected in the same manner and subject to the same provisions and limitations as in the case of the taxes with respect to which the liabilities were incurred:

(1) Income, estate, and gift taxes.--

(A) Transferees.--The liability, at law or in equity, of a transferee of property--

* * * * *

(ii) of a decedent in the case of a tax imposed by chapter 11 (relating to estate taxes) * * *

* * * * *

(c) Period of limitations.--The period of limitations for assessment of any such liability of a transferee or a fiduciary shall be as follows:

(1) Initial transferee.--In the case of the liability of an initial

transferee, within 1 year after the expiration of the period of limitation for assessment against the transferor;

* * * * *

(h) Definition of transferee.--As used in this section, the term "transferee" includes * * * any person who, under section 6324(a) (2), is personally liable for any part of such tax.

As indicated, it is the position of Russell that the Government cannot maintain the present action against her because the Government did not comply with the procedural requirements of § 6901. Specifically, it is asserted that inasmuch as the Government did not make an assessment of her liability as a transferee as required by § 6901(a), with the Government now being barred from making any such assessment by the limitations provision of § 6901(c), the Government is accordingly precluded from bringing the present action. The Government, in turn, contends that it is entitled to assert a claim under § 6324(a) (2) against the surviving joint tenant without prior assessment under § 6901, inasmuch as § 6901 only provides alternative and non-mandatory procedures for collecting taxes owed. In thus arguing, the Government relies chiefly on Leighton v. United States, supra. Before referring to Leighton, brief mention should be made of two earlier cases relied on by the United States Supreme Court in Leighton which shed light on the meaning of the statutory predecessor to § 6901, namely § 280 of the Revenue Act of 1926.

In United States v. Updike, 281 U.S. 489 (1930), the aforesaid § 280 was referred to as one prescribing "a mode of procedure" against a transferee of the property of a taxpayer. In Phillips v. Commissioner, 283 U.S. 589 (1931), it was stated that under § 280 the liability of the transferee, at law or in equity, could be enforced summarily in the same manner as that of a delinquent taxpayer, as well as by proceedings to enforce the tax lien or by actions at law or in equity.

In Leighton, the United States sought to maintain a suit in equity against the stockholders of a corporation to require them to account for distributed corporate assets to the end that such assets would then be applied to taxes due from the corporation to the Government. Citing Phillips and Updike as supporting the proposition that prior to The Revenue Act of 1926 the Government could recover in a suit in equity from the distributees of corporate assets without assessment against them, the Supreme Court observed that this right remained unless taken away by "specific words or clear intendment of the 1926 enactment." In Leighton, it was the position of the transferee stockholders that § 280 of The Revenue Act of 1926 provided the sole remedy for any proceeding against them and that the Government was barred from maintaining a suit in equity to compel the distributees of corporate assets to account for corporate property in order that it could be applied towards payment of taxes due by the company because of its failure to make timely assessment against said distributees. Without extended comment, and recognizing that the "meaning of the statute is not free from uncertainty," the Supreme Court nonetheless rejected this argument with the terse comment that even though there was no assessment, the "suit was properly brought."

Our attention has not been directed to any reported case concerned with the applicability, if any, of the assessment provisions of § 6901 to an action in law to collect on the statutory liability of a surviving tenant created by § 6324(a) (2). However, the right of the Government to maintain an action in law against a fiduciary without complying with the procedures set out in § 6901 has been considered by the courts, and such cases are helpful in resolving the present controversy. In this regard it should be noted that the collection procedures provided by § 6901 are specifically made available for enforcement of the liability of a fiduciary under 31 U.S.C. §§ 191 and 192, just as they are for the liability of a surviving tenant under § 6324(a) (2). In other words, the liability of both the fiduciary and the surviving tenant is a legal one created by statute and each is also included within the provisions of § 6901. The following cases support the proposition that the collection procedures of § 6901 are cumulative and alternative--not exclusive or mandatory--and that the Government may maintain an action in law against a fiduciary without following the collection procedures provided in § 6901: United States v. Motsinger, 123 F. 2d 585 (4th Cir. 1941); United States v. First Huntington Nat. Bank, 34 F.Supp. 578 (S.D.W.V. 1940), affirmed per curiam, 117 F. 2d 376 (4th Cir. 1941); United States v. Munroe, 65 F.Supp. 213 (W.D.Pa. 1946), and United States v. 58th Street Plaza Theatre, Inc., 237 F.Supp. 475 (S.D.N.Y. 1968).

Counsel would escape the rule of Leighton on several grounds. First, it is pointed out that Leighton involved a suit in equity, whereas the instant proceeding is one in law, not equity. We do not deem this distinction to be a significant one. Secondly, it is urged that the language used in § 6901, as well as the legislative

history of § 6901, clearly indicates that the collection provisions of §6901 were intended to be exclusive and mandatory. In this regard, it is argued that the Supreme Court in Leighton was not fully apprised by counsel in that case as to the legislative history of § 6901 and that had that court been more fully informed it would have ruled differently. Such argument should be made to the Supreme Court, and not us. We are not at liberty to go behind the Leighton rule.

For these reasons we conclude that the trial court erred in granting Russell's motion for summary judgment. Accordingly, the judgment dismissing the Government's action is reversed and the matter is remanded for further proceedings consonant with the views herein expressed.

JULY TERM - JULY 12, 1972

Before Honorable Delmas C. Hill, Honorable William J. Holloway, Jr., and Honorable Robert H. McWilliams, Circuit Judges.

Upon consideration of Appellee's motion to recall mandate and motion for stay of mandate pending application for certiorari, and the Court being advised that there is no objection to said motions,

IT IS ORDERED that the mandate of this Court issued June 30, 1972 be and the same is hereby recalled.

IT IS FURTHER ORDERED that the motion of Appellee for an order staying the mandate until September 5, 1972 pending application to the Supreme Court of the United States for writ of certiorari is granted, and that if on or before that date there is filed with the Clerk of the Court of Appeals a notice from the Clerk of the Supreme Court of the United States that appellee has filed a petition for writ of certiorari in the Supreme Court, the stay shall continue until final disposition by the Supreme Court.

APPENDIX B

[Following is set forth the opinion of the United States District Court for the District of Kansas in the matter of No. KC-2953, United States v. Harriett C. Russell, Executrix of the Estate of T. C. Russell, deceased, judgment entered April 6, 1971.]

MEMORANDUM AND ORDER

ARTHUR J. STANLEY, Jr., Senior District Judge.

This is an action brought by the United States to recover estate taxes which it contends are owed by the estate of one T. C. Russell. Liability is sought to be imposed on Harriett C. Russell, the wife of the decedent and the surviving joint tenant of some of the estate assets, pursuant to the provisions of 26 U.S.C.A. § 6324(a) (2). The government has abandoned its claim against the defendant in her representative capacity since the estate is insolvent. The matter is now before the court on cross motions for summary judgment, the parties having agreed that only questions of law remain in the case.

There are two issues in this suit which may be concisely stated as follows: (1) Is assessment against the defendant of the estate taxes owed by the T. C. Russell estate a prerequisite to suit under 26 U.S.C.A. § 6324(a) (2)? (2) Is the government's claim against the defendant as spouse and surviving tenant of T. C. Russell barred by the statute of limitations contained in 26 U.S.C.A. § 6901(c)? These questions will be answered seriatim.

The defendant concedes that the government has alternative ways to enforce the liability of a fiduciary or a transferee for the nonpayment of federal estate taxes, in some instances, without assessment against the transferee. However, she contends that the government has elected to proceed solely under § 6324(a) (2), and that assessment, and notice thereof to the transferee, is mandatory under this section. In this connection, paragraph six of the "Amended Pretrial Order," which

was signed by attorneys for both parties, reads as follows:

> "The Government concedes that the Complaint against defendant in her representative capacity and as spouse and surviving joint tenant is not based upon the enforcement of a federal estate tax lien nor is it equitable in nature."

The government has stipulated that no tax assessment has ever been made against the defendant in her individual capacity, the only assessments made having been directed against the estate.

The defendant's argument commences with an analysis of 26 U.S.C.A. § 6901. Section 6901(a) (1) (A) reads in pertinent part as follows:

> "(a) Method of collection. —The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, paid, and collected in the same manner and subject to the same provisions and limitations as in the case of the taxes with respect to which the liabilities were incurred:
>
> "(1) Income, estate, and gift taxes. —
>
> "(A) Transferees. —The liability, at law or in equity, of a transferee of property—
>
> "* * *

> "(ii) of a decedent in the case of tax imposed by chapter 11 (relating to estate taxes) * * *."

Subsection (h) of § 6901 defines a transferee to include "any person who, under section 6324(a) (2), is personally liable for" tax. Perhaps the most persuasive argument in defendant's favor is contained in the language of § 6901(c). That subsection reads:

> "(c) Period of limitations. — The period of limitations for assessment of any such liability of a transferee or a fiduciary shall be as follows:
>
> "(1) Initial transferee. — In the case of the liability of an initial transferee, within 1 year after the expiration of the period of limitation for assessment against the transferor * * *." (Emphasis supplied)

Since Congress in § 6901(c) established a limitation on the period within which an assessment must be made against a transferee, the defendant argues that the intent is clear that an assessment must be made when the government proceeds under § 6324(a) (2). Furthermore, defendant asserts that by indicating in § 6901(a) that the amounts owed by transferees shall be "assessed, paid, and collected in the same manner and subject to the same provisions and limitations as in the case of the taxes with respect to which the liabilities were incurred," that it is clear that the requirements of §§ 6213(a) and 6501(a) are applicable to this proceeding.

It is the government's contention that the procedure set out in § 6901 is at most an alternative remedy

and that it may recover from the transferee without prior assessment. I would have no difficulty in sustaining the government's position, based upon the authority of Leighton v. United States, 289 U.S. 506, 53 S.Ct. 719, 77 L.Ed. 1350 (1933), if this suit had been based in part on equitable principles. In Leighton, the Court specifically held that no assessment against the transferee was required. That case, however, involved a suit in equity in the nature of restitution or for an accounting. In our case, the government has disclaimed any right to recover on equitable principles or upon a federal estate tax lien. In these circumstances, I believe that the government, having elected to proceed solely under § 6324, may not disregard the procedural prerequisites which in my judgment must be satisfied when an action is brought under that section. Among these requirements is one that an assessment against the transferee be made and notice thereof sent to him. I base this conclusion on the specific reference in § 6901(h) to a transferee as including one whose liability is predicated on § 6324. That definition applies throughout § 6901 and I view the various subsections thereof as applicable to our case in their entirety.

The government's reliance on United States v. 58th Street Plaza Theatre, Inc., 287 F.Supp. 475 (S.D.N.Y. 1968), is misplaced. The court's conclusion of law number one clearly indicates that the government was proceeding in that case under 26 U.S.C.A. § 7403, rather than under § 7401 as in our case. My conclusion is strengthened by the following comment contained in Schuster v. C. I. R., 312 F.2d 311 (9th Cir. 1962):

> "We conclude that the transferee's liability for estate tax deficiencies, under federal law, is essentially a primary, not a secondary,

> obligation. Section 827(b) [a predecessor statute to § 6324] specifically imposes some limitations on the liability of such a transferee, for it requires that a deficiency be due from the estate, and that his liability therefor is limited to the value of the estate corpus which he received. But no other limitations were imposed, and there is nothing to suggest that others were intended. Therefore, it seems axiomatic that the transferee's liability for an estate tax deficiency is not conditioned on the Commissioner's remedies against the estate, except as the statute provides otherwise, and is in the nature of a direct and primary obligation independent of the obligation of the estate." (p. 315) See also United States v. Prince, 120 F.Supp. 563 (S.D.N.Y.1954) and United States v. Fisher, 57 F.Supp. 410 (E.D.Mich.1944), both of which seem to imply that assessment must be made against the transferee where the government does not proceed on an equitable or "trust fund" theory.

The defendant next contends that the government's claim is barred by the statute of limitations contained in 26 U.S.C.A. § 6901(c). Section 6901(c) provides a period of limitation for assessment of transferee liability of one year after the expiration of the period of limitation for assessment against the transferor, the Estate of T. C. Russell. Section 6501(a) establishes a three-year limitation period for assessing a tax liability commencing, insofar as is applicable here, on the filing date of the estate tax return, in this case August 30, 1961. Under § 6501(a), therefore, the period for assessment against the estate would have expired August 30, 1964. However, § 6503(a) contains a tolling provision which is applicable in our case. That section provides

for tolling for the period beginning with the date of mailing the notice of deficiency, in this case August 20, 1964, and if, as here, a Tax Court petition is filed, continuing until the decision of the Tax Court has become final and for 60 days thereafter. In accordance with 26 U.S.C.A. § 7483, the Tax Court decision became final on January 20, 1967, three months following the date of its decision which was entered on October 20, 1966. Sixty days after the Tax Court decision became final the limitation period was reviewed. Since the notice of deficiency with respect to the T. C. Russell estate was mailed on August 20, 1964, ten days before the assessment period expired, the government was barred from making any further assessment against the estate on April 2, 1967, eleven days after the limitation period was revived. Under § 6901(c), therefore, the government had one year from April 1, 1967 within which to assess a tax liability against the defendant as a transferee under § 6324. This the government did not do and consequently this action is barred by the statute of limitations.

It is ordered that the defendant's motion for summary judgment be granted.

It is further ordered that the plaintiff's motion for summary judgment be denied.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-355

HARRIET C. RUSSELL, EXECUTRIX OF THE ESTATE OF T. C. RUSSELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the District of Kansas (Pet. App. B2-B7) is reported at 327 F. Supp. 632. The opinion of the court of appeals (Pet. App. A2-A8) is reported at 461 F. 2d 605.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 1972 (Pet. App. A2-A8). The petition for a writ of certiorari was filed on August 30, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the United States may sue a surviving joint tenant for unpaid estate taxes pursuant to Section 6324(a)(2) of the Internal Revenue Code of 1954, without making assessment against her individually as a transferee.

STATUTES INVOLVED

The pertinent provisions of Section 6324 and 6901 of the Internal Revenue Code of 1954, 26 U.S.C. 6324 and 6901, are set forth at Pet. 3–4.

STATEMENT

The United States initiated this action to reduce to judgment petitioner's liability, under Section 6324(a)(2) of the Internal Revenue Code of 1954 ("the Code"), for unpaid estate taxes in the amount of $116,165 due from her husband's estate. The material facts are not in dispute. Petitioner is the surviving joint tenant of property included in her husband's gross estate for federal estate tax purposes. Since this property did not pass through the probate estate, it was not available to the personal representative for payment of estate taxes. The estate tax was not paid when due, and petitioner as surviving joint tenant therefore became personally liable for the tax under Section 6324(a)(2). Assessment for the taxes due was made against the estate but not against petitioner.

The district court granted petitioner's motion for summary judgment on the ground that the action was

barred by the government's failure to make a timely assessment against petitioner pursuant to Section 6901 of the Code (Pet. App. B2–B7). The court of appeals reversed and remanded the cause on the ground that under *Leighton* v. *United States*, 289 U.S. 506, the absence of an assessment against petitioner in her personal capacity does not bar an action to recover estate taxes from her as a surviving joint tenant (Pet. App. A3, A5–A8).

ARGUMENT

Section 6324(a)(2) provides that if an estate tax is not paid when due, a "surviving tenant * * * who receives * * * property included in the gross estate * * *, to the extent of the value, at the time of the decedent's death, of such property, shall be personally liable for such tax." Petitioner does not dispute that this provision makes her personally liable for the estate taxes not paid by her husband's estate. Petitioner's sole argument here is that the government's failure to make an assessment under Section 6901 against her in her personal capacity bars the present action for recovery of those taxes. This contention was properly rejected by the court below and warrants no further review.

Section 6324(a)(2), like its predecessors, imposes upon certain individuals a primary personal liability for payment of all or part of the unpaid estate taxes due from another's estate. See *Schuster* v. *Commissioner*, 312 F. 2d 311 (C.A. 9). Surviving joint tenants such as petitioner have been included within

the coverage of the statute since 1942.[1] Section 6901 provides a summary and expeditious method for the collection of taxes from transferees and fiduciaries which was not previously available to the government.[2] Since 1942, therefore, the procedures set forth in Section 6901 have been available to the government for enforcement of a surviving joint tenant's liability for unpaid estate taxes under Section 6324(a)(2).

Petitioner apparently agrees (Pet. 8) that this Court's decision in *Leighton* v. *United States*, 289 U.S. 506, if permitted to stand, is dispositive of her argument that the procedures set forth in Section 6901 are a mandatory prerequisite to a suit by the government to recover taxes under Section 6324(a)(2). In *Leighton*, the government had brought suit to compel transferees of certain corporate assets to pay unpaid income taxes due from the insolvent corporation. There, as here, assessment had been made against the taxpayer (the corporation) but not against the transferees individually. The transferees there, as here, argued that by enacting the procedures

[1] Originally enacted as Section 209 of the Revenue Act of 1916, 39 Stat. 756, the provision has remained essentially unchanged in substance, but was amended in 1942 to expand the enumeration of persons covered and to bring within its scope substantially all property interests includible in the gross estate. Section 411 of the Revenue Act of 1942, 56 Stat. 798.

[2] This provision was first enacted as Section 280 of the Revenue Act of 1926, 44 Stat. 9. Prior to its enactment the government could enforce so-called "transferee liability" only by seeking legal or equitable relief. See *Commissioner* v. *Stern*, 357 U.S. 39; *Phillips* v. *Commissioner*, 283 U.S. 589, 592; *Leighton* v. *United States*, 289 U.S. 506, 507–508.

now embodied in Section 6901, Congress had required "an assessment against them before suit" and that such procedures were intended to be "the sole remedy available" to enforce transferee liability. 289 U.S. at 509. This Court, after reviewing several post-1926 lower court decisions recognizing the government's right to collect taxes from transferees by suit without assessment, rejected the contention that compliance with the procedures now found in Section 6901 was a mandatory prerequisite to bringing such suit.

Petitioner errs in contending (Pet. 9–13) that this Court had not been properly apprised of the relevant legislative history when *Leighton* was decided. Although not discussed in the Court's opinion, the congressional reports accompanying both the 1926 and 1928 Revenue Acts, including those upon which petitioner relies, were thoroughly discussed in the government's brief in *Leighton*. See Gov. Br. 17–19, *Leighton* v. *United States*, No. 735, O.T., 1932. The government argued there that the predecessor of Section 6901 contained no language indicating that its assessment procedures must be followed before a suit for collection may be initiated, that the statutes were not ambiguous, and that reliance on legislative history is appropriate only when necessary to settle, rather than create, doubt. Those arguments apply equally here. See, *e.g.*, *Ex Parte Collett*, 337 U.S. 55, 61; *United States* v. *Shreveport Grain & Elevator Co.*, 287 U.S. 77, 83–84. And there is, in any event, no reason now to overturn this long-standing interpretation of the statute.

As the court of appeals correctly determined, the fact that the present case involves a legal action in debt whereas *Leighton* was a suit in equity is irrelevant. It is well established that under *Leighton*, which was concerned with the preservation generally of pre-existing modes of revenue collection, the government may maintain legal actions to enforce obligations to pay taxes without resort to or compliance with the Section 6901 procedures. See, *e.g.*, *United States* v. *Motsinger*, 123 F. 2d 585 (C.A. 4). Assessment of tax liability is not itself a prerequisite to the government's right to collect taxes owed to it. Rather, statutory assessment procedures are designed merely to facilitate collection, and the government may sue to collect taxes without assessment unless the statute expressly provides otherwise. See, *e.g.*, *Savings Bank* v. *United States*, 19 Wall. 227, 240–241.

This Court's decision in *Leighton* was thus properly applied by the court below, and there is no conflict among the courts of appeals.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1972.

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